

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Disposition of Down Payments and)	
Pending Applications for Licenses Won)	
During Auction No. 35 for Spectrum)	WT Docket No. 02-276
Formerly Licensed to NextWave Personal)	
Communications Inc., NextWave Power)	
Partners, Inc., and Urban Comm – North)	
Carolina, Inc.)	

REPLY COMMENTS OF ELDORADO COMMUNICATIONS, LLC

Eldorado Communications, LLC (“Eldorado”), by counsel, hereby submits its reply comments concerning the Commission’s proposed disposition¹ of down payments and pending applications for licenses won during Auction No. 35 that were held formerly by NextWave Personal Communications Inc., NextWave Power Partners Inc., (collectively “NextWave”) and Urban Comm – North Carolina, Inc (“Urban Comm”).²

Parties commenting in this proceeding agree that the telecommunications industry is facing severe economic conditions.³ Not surprisingly, Auction No. 35 winners argue that these economic conditions warrant unconditional relief from their auction obligations.⁴ Eldorado does not dispute that economic conditions have changed

¹ *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc., and Urban Comm – North Carolina, Inc.*, WT Docket No. 02-276 (rel. Sept. 12, 2002) (the “Notice”); see also *Commission Seeks Comment on Disposition of Down Payments and Pending Applications for Licenses Won During Auction No. 35 for Spectrum Formerly Licensed to NextWave Personal Communications Inc., NextWave Power Partners, Inc., and Urban Comm – North Carolina, Inc.*, WT Docket No. 02-276 (rel. Sept. 12, 2002) (correcting comment date and reply comment date in the Notice).

² Eldorado hereby incorporates by reference its (1) Petition for Emergency Relief (filed Nov. 7, 2001); (2) Opposition to Joint Request for Immediate Refund of Auction No. 35 Down Payments for NextWave Licenses (filed Jan. 17, 2002); (3) Petition for Reconsideration (filed Apr. 26, 2002); and (4) Comments (filed Oct. 11, 2002).

³ See, e.g., Comments of Salmon PCS, LLC, Exhibit 1 (filed Oct. 11, 2002) (economic study of the state of the telecommunications industry since March 31, 2002).

⁴ The majority of the comments before the Commission (12 of 22) were filed by Auction No. 35 winners.

for the worse since Auction No. 35 was held. Eldorado, however, takes issue with the contention that these changed economic circumstances justify special treatment for Auction No. 35 winners.

Auction No. 35 winners argue that they have “no responsibility “ for their current circumstances and that they seek relief from conditions that are “no fault of their own.”⁵ Certain Auction No. 35 winners and the Cellular Telecommunications and Internet Association also suggest that the circumstances facing Auction No. 35 winners are materially different from the conditions that led the Commission to offer limited relief to Auction No. 5 winners.

Auction No. 35 winners are not victims of unforeseeable circumstance. They are, quite to the contrary, sophisticated and economically powerful wireless companies that made careful business decisions when they successfully bid in Auction No. 35 and who now wish to escape the foreseeable consequences of those decisions.⁶ Eldorado recognizes that Auction No. 35 winners may be facing changed economic circumstances, but this does not distinguish their situation from that which faced Auction No. 5 winners in an earlier phase of the same auction process. Accordingly, fairness requires that the Auction No. 5 winners, who were truly the victims of unforeseeable events, and who truly are small business entities, be offered at least equivalent relief.

⁵ Comments of T-Mobile USA, Inc. at 2 (filed Oct. 11, 2002); Comments of Cellco Partnership, d/b/a Verizon Wireless at i (filed Oct. 11, 2002); *see also* Comments of the Cellular Telecommunications & Internet Association at 5 (filed Oct. 8, 2002) (arguing winning bidders have been subject to “severe financial constraints completely beyond their control”).

⁶ The Auction No. 35 winners are, to a significant extent, responsible for the delay awarding spectrum that they now claim warrants extraordinary relief. *See, e.g.,* Motion to Dismiss Petition for a Writ of Certiorari at 2, *Cellco Partnership d/b/a Verizon Wireless v. NextWave Personal Communications Inc.*, No. 01-654 (U.S. Feb. 5, 2002) (noting that as a result of extensions granted when there was a prospect of settlement, there was “no realistic possibility . . . cases [could] be heard and decided” during 2001 Term). Thus, but for the extraordinary buy out deal and special legislation that these entities sought to race through Congress, it is highly likely that the Supreme Court would have already reached decision resolving once and for all NextWave’s claimed rights to the spectrum in question.

To the extent that the Commission may conclude that further relief for the Auction No. 35 winners may be warranted by “the status of the capital markets and other economic events,”⁷ it can no longer turn a blind eye to Auction No. 5 winners, who found themselves unable to obtain financing to construct their networks and were similarly damaged by economic changes over which they had no control. And, unlike the Auction No. 35 winners, who were warned repeatedly by the Commission that their spectrum was subject to various uncertainties,⁸ the Auction No. 5 winners had no advance notice that their spectrum might be rendered essentially unusable.⁹ For this reason, as Eldorado made clear in its initial comments, Auction No. 5 winners – at minimum – warrant comparable relief as proposed for Auction No. 35 winners.

Auction Nos. 5 and 35 are parts of the same C-block auction process. Both Auction No. 5 and Auction No. 35 winners successfully bid for the same spectrum. Both Auction No. 5 and Auction No. 35 winners have faced economic downturns that have frustrated their business plans. But Auction No. 5 winners were required to sacrifice down payments and business opportunities to be relieved of their commitments. Now, Auction No. 35 winners may be given relief from their auction obligations without the level of sacrifice that was required of Auction No. 5 winners.

As Eldorado stated in its initial comments, there is no justification for such disparate treatment. While money must be returned to Auction No. 5 participants, including a substantial credit for funds so long held, the remedy also should include

⁷ Notice at 4.

⁸ See, e.g., C And F Block Broadband PCS Spectrum Auction Scheduled For December 12, 2000 Notice and Filing Requirements for 422 Licenses in the C and F Block Broadband PCS Spectrum Auction, 15 FCC Rcd 19485, 19493 (2000) (“Potential bidders are solely responsible for identifying associated risks, and investigating and evaluating the degree to which such matters may affect their ability to bid on or otherwise acquire licenses in Auction No. 35.”) (emphasis in original); see also Sept. 6, 2001, Public Notice at 17256.

⁹ Because unforeseeable changes in the capital markets prevented Eldorado and other Auction No. 5 winners from building out the licenses they won in Auction No. 5, the Commission’s ability to award those licenses after Auction No. 5 is immaterial. Both sets of winners “won” essentially unusable licenses.

restoration of business opportunities denied to the Auction No. 5 designated entities,
whose goal remains participation in the PCS business.

Respectfully submitted,

ELDORADO COMMUNICATIONS, LLC

A handwritten signature in black ink that reads "Henry Goldberg". The signature is written in a cursive style with a large, stylized "H" and "G".

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